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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1678

FEDERAL POWER COMMISSION,
*Petitioner,*

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *et al.*,
*Respondents.*

## BRIEF AMICUS CURIAE OF TRANSCONTINENTAL GAS PIPE LINE CORPORATION IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## INDEX


| | Page |
|---|---|
| Interest of Amicus Curiae | 1 |
| Opinions Below, Jurisdiction, and Statutes Involved | 3 |
| Questions Presented | 3 |
| Statement | 3 |
| Reasons To Defer Action on Writ | 7 |
| Conclusion | 9 |


## CITATIONS

Cases:


*F.P.C.* v. *Transcontinental Gas Pipe Line Corporation*, 96 S.Ct. 579 (1976) ..... 6, 8

*F.P.C.* v. *Transcontinental Gas Pipe Line Corporation*, 81 S.Ct. 435 (1961) ..... 9

*Consolidated Edison Company of New York, Inc.* v. *F.P.C.*, 511 F.2d 372 (D.C.Cir. 1974) ..... 6

*Transcontinental Gas Pipe Line Corporation, et al.* v. *F.P.C., appeal pending*, Nos. 74-2036, *et al.*, D.C. Cir. ..... 2, 3, 4, 5, 6, 7, 8, 9, 10

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### INTEREST OF AMICUS CURIAE

Transcontinental Gas Pipe Line Corporation ("Transco") has received the consent of all parties of record in the proceeding below to participate in this proceeding as *amicus curiae,* as evidenced by letters filed with the Clerk on June 24, 1976.

Transco is a major interstate natural gas transmission system extending from its principal sources of supply in the Texas and Louisiana areas, onshore and

offshore, through the mid-Atlantic states to its termini in the New York Metropolitan Area. By virtue of its transportation and sale for resale of natural gas in interstate commerce, Transco is a "natural gas company" subject to regulation by the Federal Power Commission ("FPC" or "Commission") under the Natural Gas Act, 15 U.S.C. 717, *et seq.* Most of Transco's sales are to local gas distribution companies in the region traversed by the pipeline system from Alabama to New York City.

Transco's interest in this proceeding stems from the fact that it has a case pending in the United States Court of Appeals for the District of Columbia Circuit[1] which involves similar threshhold legal issues arising, however, in a far different factual setting. The Commission is seeking a determination in the instant case which would control the *Transco* case as well as several others. To quote the Commission, it hopes that a decision herein favorable to its position will "avert a spate of unnecessary administrative and judicial litigation over the merits of particular compensation schemes proposed in connection with each pipeline's curtailment plan [footnote omitted]." (FPC Pet., p. 10).[2]

Under the circumstances, Transco urges the Court, for reasons explained more fully hereinbelow, to defer action on certiorari until the *Transco* proceeding is itself ripe for review, so that other important facets of the so-called "curtailment compensation" question, arising from a different fact situation, can be considered by the Court at the same time.

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[1] *Transcontinental Gas Pipe Line Corporation, et al.* v. *F.P.C.*, D.C. Cir. Nos. 74-2036, *et al.*

[2] Reference "FPC Pet." is to the Commission's Petition for Writ of Certiorari.



## OPINIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

Transco adopts the statements of Opinions Below (FPC Pet., p. 1), Jurisdiction (FPC Pet., p. 2), and Statutes Involved (FPC Pet., pp. 2-5) set forth in the Commission's petition.

## QUESTIONS PRESENTED

In the instant proceeding, Transco views the question presented to be:

> Whether, in connection with its approval of curtailment plans to be observed by pipeline companies, the FPC has the authority to impose a compensation plan whereby lower priority non-jurisdictional direct sale customers, who were required to secure more expensive alternate fuels because of curtailment of natural gas service, would be compensated for such increased costs by the higher priority jurisdictional resale customers who continued to receive gas service.

The issue presented in the *Transco* proceeding, while it has been characterized under the broad umbrella of "compensation", is different:

> Whether, under the Natural Gas Act, a curtailment plan for the allocation among a pipeline's customers of the pipeline's inadequate supplies, may properly include tariff provisions designed to mitigate the disparate economic impact of disproportionate allocation of the gas among these customers.

## STATEMENT

To place in perspective Transco's position that the Court should defer action herein until the *Transco* case is ripe for review, we shall briefly outline the pertinent facts of the *Transco* case and its present procedural posture.

Curtailment on Transco's system has had a long and complex history, commencing in the early 1970's. So far, a series of interim curtailment procedures covering successive yearly periods has been worked out by settlement among the parties, and approved by the Commission or placed into effect by court order.

In capsule summary, in earlier periods when Transco's system curtailment percentage was relatively low, pro-rata reduction from contract entitlements, with provisions for protection of high-priority markets, was the basic methodology. The Commission having expressed its policy in Order No. 467-B in favor of so-called "end-use" curtailment, a movement away from pro-rata and toward end-use has taken place. It is important to note that throughout this early history of Transco's curtailment, some type of "compensation" was provided whereby the customers whose high-priority markets were given added protection agreed to shoulder added cost burdens in recognition thereof. Until the settlement in question, the Commission routinely approved such features, in Transco's cases as well as the curtailment procedures of other pipelines. *See, e.g.*, 46 FPC 1212 (1971), 48 FPC 1060 (1972), and 48 FPC 647 (1972).

For the curtailment plan at issue in the *Transco* proceeding, a provision was included whereby customers who were curtailed greater than system average would receive monetary credits to their bills while the bills of those who were curtailed less than system average would reflect monetary debits. This is the so-called "compensation" feature of the Transco curtailment settlement plan. The term "compensation" is a misleading characterization of what occurs since no monies flow between or among customers; rather, Transco's



costs are assessed to a greater degree against those customers who receive greater than pro-rata (system average) supplies. The rationale of this type of agreed-to "compensation" was simply to mitigate the adverse economic consequences flowing from loss of sales by the customers who consented to receive less than their pro-rata share of Transco's available supply.

Unlike the *Mississippi* case where lower-priority direct sale boiler-fuel users sought to be recompensed for the added cost of alternate fuels, the effect of the agreed-to compensation in *Transco* was that those customers who historically had a larger percentage of the high-priority markets (and thus were allocated a larger share of Transco's gas) would shoulder more of Transco's costs to help soften the rate impact on the remaining high-priority consumers served by those distributors having a smaller historical high-priority load.

Under traditional principles of utility ratemaking, gas distribution companies are permitted the opportunity to recover their costs of doing business. A large portion of such costs are "fixed" by virtue of plant investment regardless of the volume of gas service rendered. To illustrate the disparate economic impact of unequal curtailment, if two companies historically had the same costs and the same contract entitlement but suddenly one of them is left with a much smaller high-priority market than the other against which to charge its costs, the unit cost of service and the resultant rates to those few remaining customers would be much higher. The shifting of costs under the Transco settlement plan is intended as an offset to that result.

The Commission ruled that such a feature was unlawful for several reasons, and disapproved the settle-

ment in its entirety (FPC Pet., App. G and H, pp. 37a-102a). The Commission orders pending review in the *Transco* proceeding were incorporated by reference and relied upon by the Commission in denying rehearing in the *Mississippi* proceeding.

Although Transco's proceeding was first in time in terms of final agency action, it has fallen behind *Mississippi* in the course of further litigation. The gas allocation portion of the Transco settlement was placed into effect by order of the United States Court of Appeals for the District of Columbia Circuit, pending further order of the Court.[3] 511 F.2d 372 (1974). In the same order, the court of appeals adopted the suggestion of Transco and others and directed that the funds generated by operation of the compensation provisions be placed in an escrow account pending a determination of their legality.

After the compensation question had been briefed and argued, the court of appeals *sua sponte* requested information on Transco's gas supply situation, and after responses by Transco, the FPC and others, entered an order directing the Commission to investigate Transco's gas supply and report to the court within 30 days. This Court on January 19, 1976, vacated that order and remanded the case to the court of appeals for further proceedings. *F.P.C.* v. *Transcontinental Gas Pipe Line Corporation,* 96 S.Ct. 579 (1976).

On February 6, 1976, the court of appeals remanded the case to the FPC to make a record and findings

[3] The allocation of supplies for 1973-74 is now a moot question, the period having long since expired. At issue is the so-called compensation question.



concerning Transco's supply situation. By order issued June 25, 1976, in Docket No. RP72-99, the Commission entered an order finding that a shortage existed on Transco's system requiring curtailment of service, and directed its Solicitor to lodge such order with the court of appeals. The Solicitor filed a motion to lodge on June 28, 1976.

## REASONS TO DEFER ACTION ON WRIT

1. The Commission contends that the Natural Gas Act prohibits the "imposition of any scheme whereby high-priority customers under a pipeline's curtailment plan are required, as a condition of receiving natural gas deliveries, to make additional payments for the benefit of low-priority customers whose deliveries are curtailed" (FPC Pet., p. 9). The Commission hopes that prompt resolution of this question in its favor will "avert a spate of unnecessary administrative and judicial litigation", citing, among others, the *Transco* proceeding (FPC Pet., p. 10).

As shown above, however, the compensation question presented in the *Transco* proceeding is clearly distinguishable from the Commission's characterization of the question in *Mississippi,* i.e., payment by high-priority resale direct consumers to low-priority customers, and the compensation issue in *Transco* arises in a far different factual context. Therefore, before making any general determination of the lawfulness of curtailment compensation plans under the Act, this Court should have the benefit of considering this issue from a different focus, as well as the other factors and circumstances which are presented in *Transco.* Surely, the broad ruling sought by the Commission cannot rest on the narrow fact situation in *Mississippi.*

As noted above, the Commission has moved to lodge its June 25, 1976 order finding that curtailment by Transco is necessary due to its gas supply shortage, in response to the court of appeals' concern on that matter. Therefore, the court of appeals will be in a position promptly to issue its decision on the merits under this Court's direction that the case be given "swift and priority consideration".[4] In so doing, this Court expressly noted the "potential importance of a resolution on the merits of the compensation issues presented in the instant [*Transco*] case".[5]

2. The Commission's rationale in *Mississippi* was based in large part on its orders in *Transco* and the Commission's instant petition draws heavily on Judge MacKinnon's dissenting opinion to the court of appeals' February 6, 1976 remand order in *Transco*. These facts amply demonstrate the advisability of deferring action until the *Transco* proceeding has been decided by the court of appeals. Obviously, where this Court is considering review of agency policies and conclusions of law first promulgated in a specific proceeding, it would be better served to consider the record made in *that* proceeding, rather than be forced to rely exclusively on the record made in some other unrelated proceeding. This is particularly evident where, as here, the scope of the issue and factual setting of the two cases are substantially different.

3. If certiorari is nevertheless granted in *Mississippi*, Transco urges the Court to limit its review to the factual situation and issue presented therein, i.e.,

[4] *F.P.C.* v. *Transcontinental Gas Pipe Line Corporation*, 96 S. Ct. 579, 584 (1976).

[5] *Ibid.*



payments by high-priority jurisdictional customers to low-priority non-jurisdictional consumers, so as to preserve the question pending in the *Transco* proceeding. We submit that the preferable course of action, in terms of judicial economy, would be to consider the two proceedings jointly.

4. If the Court is disposed to act without the benefit of contemporaneous review of the *Transco* proceeding, Transco submits that the court below in *Mississippi* is clearly correct in its conclusions that compensation payments do not *ipso facto* result in discriminatory rates in violation of the Natural Gas Act and that such payments cannot properly be viewed as sales for resale requiring certification and tariff filings under the Act.[6]

The court of appeals correctly notes that "the Commission is vested with both jurisdiction and broad powers to solve the problems caused by curtailment". 522 F.2d 1345, 1349. And, it is well-settled that the Commission has the power and responsibility to consider *all* factors bearing on the public interest. *F.P.C.* v. *Transcontinental Gas Pipe Line Corporation*, 81 S.Ct. 435, 439 (1961). Therefore, the Commission cannot ignore the economic results flowing from end-use type curtailment plans.

## CONCLUSION

For the above reasons, this Court should defer action on the instant petition for writ of certiorari until other important ramifications of the curtailment compensa-

[6] Transco does not necessarily endorse the merits of any compensation scheme, such as proposed in the *Mississippi* case, whereby high-priority consumers would effectively compensate low-priority industries. This is not involved in the *Transco* case.

tion question are brought into focus in the *Transco* proceeding. Alternatively, if certiorari is granted, the Court's decision should be confined to the narrow question in *Mississippi*. In that connection, this Court should affirm the court of appeals' conclusion that curtailment compensation is not unlawful *per se* under the Natural Gas Act.

Respectfully submitted,

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